

ORIGINAL

No. 91-8674

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHN ANGUS SMITH, PETITIONER

v.

UNITED STATES OF AMERICA



ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

1188

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 924(c)(1), which prohibits the use of a firearm "during and in relation to any * * * drug trafficking crime," embraces the exchange of firearms for narcotics.
2. Whether the district court committed plain error in instructing the jury on the elements of a Section 924(c) offense.

(I)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 835-837) is reported at 957 F.2d 835.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1992. The petition for a writ of certiorari was filed on June 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to possess cocaine with intent to distribute it, in violation of

21 U.S.C. 846; attempted possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); using an automatic firearm and silencer during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1); being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1); possession of unregistered automatic firearms, in violation of 26 U.S.C. 5861(d); possession of unregistered silencers, in violation of 26 U.S.C. 5842; interstate transportation of a stolen motor vehicle, in violation of 18 U.S.C. 2312; and possession of firearms by a fugitive from justice, in violation of 18 U.S.C. 922(g)(2).¹ He was sentenced to 393 months' imprisonment, to be followed by a three-year period of supervised release. The court of appeals affirmed. Pet. App. 835-837.

1. The evidence at trial showed that on December 27, 1989, petitioner and his co-defendant offered to exchange a MAC-10 machine gun and a silencer for two ounces of cocaine. An informant introduced them to Detective Robert Landerville of the Broward County Sheriff's Office, who was posing as a pawnbroker. Gov't C.A. Br. 6-7. Petitioner said he had a MAC-10 machine gun for sale and that he wanted two ounces of cocaine in return for the weapon. Petitioner showed the machine gun to Landerville, who agreed to petitioner's proposition and then departed, stating that he would attempt to obtain the cocaine from his sources. *Id.* at 7. Later that evening, petitioner left his hotel room and was arrested after

¹ Petitioner's co-defendant Charles Roy Davis pleaded guilty to five counts of the indictment prior to trial and testified on behalf of the government at petitioner's trial.

a high speed chase. *Id.* at 8-10.

2. On appeal, petitioner argued that bartering a firearm for drugs does not constitute use of a firearm in relation to a drug trafficking crime within the meaning of 18 U.S.C. 924(c), relying on the Ninth Circuit's holding to that effect in United States v. Phelps, 877 F.2d 28 (1989). The court of appeals rejected petitioner's interpretation of Section 924(c). Pet. App. 835-837. The court found that the plain language of the statute unambiguously encompassed exchanges of firearms for drugs, and accordingly declined to follow the Ninth Circuit's decision in Phelps. *Id.* at 836. The court further observed that it would have reached the same conclusion even "if forced to confront the legislative history of section 924(c)(1)." *Id.* at 836 n.5. In addition, the court held it is not necessary to fire, brandish, or even display a weapon during a drug trafficking offense in order to violate Section 924(c), and that "all that is needed is 'an intent to use the weapon to facilitate in any manner the commission of the offense.'" *Id.* at 837 (quoting United States v. Phelps, 895 F.2d 1281, 1283 (9th Cir. 1990) (Kozinski, J., dissenting from denial of rehearing en banc)).²

ARGUMENT

1. Petitioner renews his contention (Pet. 11-15) that 18 U.S.C. 924(c) does not apply to the use of a firearm as a medium of

² The court of appeals also rejected petitioner's claim that the trial judge should have instructed the jury not to convict him under Section 924(c) unless it found that he intended to use the weapon offensively. Pet. App. 836 n.4.

exchange in a narcotics transaction. He argues that certiorari is warranted because the decision below conflicts with the decision of the Ninth Circuit in United States v. Phelps, 877 F.2d 28 (1989).

a. Section 924(c) provides enhanced penalties for any person who "uses or carries" a firearm "during and in relation to any * * * drug trafficking crime." In United States v. Phelps, *supra*, a panel of the Ninth Circuit held that the exchange of a MAC-10 machine gun for drug component chemicals did not constitute the "use" of a firearm in relation to a drug trafficking offense within the meaning of Section 924(c). Relying on legislative history, the Ninth Circuit held that the statute's scope was limited to "'persons who chose to carry a firearm as an offensive weapon for a specific criminal act.'" 877 F.2d at 30 (citation omitted).

As the court below recognized, the Ninth Circuit's reasoning is irreconcilable with the plain language of the statute, which broadly embraces any use of a firearm "during and in relation to" a drug trafficking offense. The requirement that the firearm be used in relation to the drug trafficking crime means simply that it must be used in some way to facilitate the predicate offense. Pet. App. 837; United States v. Harris, 959 F.2d 246, 261 (D.C. Cir. 1992), petitions for cert. pending, Nos. 91-8167, 91-8328, and 91-8333; United States v. Stewart, 779 F.2d 538, 540 (9th Cir. 1985) (Kennedy, J.), cert. denied, 484 U.S. 867 (1987). Nothing in the language of the statute restricts such usage to employment of the firearm as a weapon or precludes application of the statute in situations in which the firearm is used as a medium of exchange.

To the contrary, "[i]t is difficult to think of a term broader than 'in relation to' [and there is] no plausible interpretation of the phrase that would place [a participant in such an exchange] beyond the reach of section 924(c)." United States v. Phelps, 895 F.2d 1281, 1283 (9th Cir. 1990) (Kozinski, J., dissenting from denial of rehearing en banc). As the court below observed, "all that is needed is 'an intent to use the weapon to facilitate in any manner the commission of the offense.'" Pet. App. 837.

Because the plain language of the statute unambiguously encompasses the use of firearms as a medium of exchange in a drug transaction, recourse to legislative history is unnecessary. Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146, 1149 (1992); Toibb v. Radloff, 111 S. Ct. 2197, 2200 (1991); Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 809 n.3 (1989). In any event, nothing in the sparse legislative history of Section 924(c) supports petitioner's narrow construction of that statute.

When originally enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1224, Section 924(c) applied to anyone who "use[d] a firearm to commit any [federal] felony" or who "carrie[d] a firearm unlawfully during the commission of a [federal] felony." In the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005(a), 98 Stat. 2138-2139, Congress revised that provision by deleting the requirement that the firearm be carried "unlawfully" and substituting the requirement that the firearm be used "in relation to" the underlying offense. The Senate Report accompanying the 1984 amend-

ment explains that Congress added the "in relation to" requirement because, having broadened the scope of the statute to include cases in which firearms were carried lawfully, it wished to preclude application of the statute where the presence of firearms "played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight." S. Rep. No. 225, 98th Cong., 1st Sess. 314 n.10 (1983). Thus, the legislative history of the 1984 amendment to Section 924(c) "reveals only that Congress meant to exclude from the sweep of section 924(c) those rare cases where the gun plays absolutely no part in the criminal activity because it is completely concealed and its presence at the scene of the crime is accidental. This is the antithesis of the situation presented here." United States v. Phelps, 895 F.2d at 1286 (Kozinski, J., dissenting from denial of rehearing en banc).

When Congress amended Section 924(c) in 1986 to extend its provisions to persons who use or carry a firearm in relation to a "drug trafficking offense" (see Pub. L. No. 99-308, § 104(a)(2), 100 Stat. 456-457 (1986)), the committee report accompanying the amendment made clear that its purpose was to fulfill "the need for more effective protection of law enforcement officers from the proliferation of machine guns and high-powered 'assault-type' weapons that are increasingly being used by criminals." H. R. Rep. No. 495, 99th Cong., 2d Sess. 7 (1986). In this case, the introduction of petitioner's machine gun into the drug transaction created precisely the risks that Congress sought to eliminate

through enactment of the 1986 amendment. See United States v. Harris, 959 F.2d at 262; United States v. Phelps, 895 F.2d at 1284-1285 (Kozinski, J., dissenting from denial of rehearing en banc).

Although the decisions of the court below and of the District of Columbia Circuit in United States v. Harris, *supra*, are in conflict with that of the Ninth Circuit in Phelps on the question whether a firearm exchanged for drugs is used "in relation to" a drug trafficking crime, further review by this Court to resolve the conflict is not warranted at this time. The Phelps panel was the first appellate court to address the question, and the Ninth Circuit remains sharply divided on the issue. See United States v. Phelps, 895 F.2d at 1282 (Kozinski, J., dissenting from denial of rehearing en banc). Since the decision in Phelps, the Eleventh Circuit in this case and the District of Columbia Circuit in United States v. Harris, *supra*, have reached the opposite conclusion, and thus there is a clear trend away from the position taken by the original Phelps panel. If, as seems likely, that trend continues, the Ninth Circuit may well reconsider its position, obviating any need for Supreme Court review. Accordingly, review at the present time would be premature.³

2. Petitioner also argues (Pet. 16-19) that the trial court committed plain error in failing to instruct the jury that use of

³ Should the Court wish to resolve the circuit conflict at this juncture, we suggest that this case would provide a better vehicle for addressing the question than would the petitions for certiorari in United States v. Harris (Nos. 91-8328 and 91-8167), because none of the present members of the Court participated in deciding this case in the lower courts.

a weapon solely for barter does not violate Section 924(c). We have already shown, however, that the statute in fact covers the type of conduct involved here. That being so, the trial court obviously did not commit error -- let alone plain error -- in its instructions on the Section 924(c) count.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

LOUIS M. FISCHER
Attorney

AUGUST 1992

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by mail on August 17, 1992.

GARY KOLLIN
101 N.E. 3RD AVENUE
SUITE 302
FT. LAUDERDALE, FL 33301-1100

Kenneth W. Starr
KENNETH W. STARR
Solicitor General

August 17, 1992

